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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK ELI HEARD,

Defendant and Appellant.

D052492

(Super. Ct. No. SCD193832)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

In an amended indictment, the San Diego County District Attorney charged Frank Eli Heard and codefendant Wade Thomas Mills III (together defendants) with two counts each of committing attempted willful, deliberate and premeditated murder on or about January 3, 2005 (counts 1 & 2: Pen. Code,¹ §§ 664, 187, subd. (a) [victims: Simon

¹ All further statutory references are to the Penal Code unless otherwise specified.

Judge & Terrance Hillman, respectively]); and charged Heard with committing one count of murder on or about July 10, 2005 (count 3: § 187, subd. (a) [victim: Lino D.]). The indictment alleged as to all counts that defendants committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). It also alleged with respect to counts 1 and 2 that Heard and Mills were principals who personally discharged a firearm and caused great bodily injury within the meaning of section 12022.53, subdivisions (c), (d) and (e)(1); and with respect to count 3, that Heard personally discharged a firearm causing great bodily injury and death within the meaning of section 12022.53, subdivisions (c) and (d).

The court granted Heard's motion to sever counts 1 and 2 from count 3, and a jury trial commenced on counts 1 and 2 first. The jury found Heard guilty of counts 1 and 2 as charged, and found true the gang and firearm enhancement allegations. The jury deadlocked as to Mills on both charges, and the court declared a mistrial as to his case.

Following the verdicts on counts 1 and 2, Heard entered into a plea agreement as to count 3, pleading guilty to voluntary manslaughter (§ 192, subd. (a)) as a lesser included offense, and admitting the truth of both the gang allegation and a personal use of a firearm allegation (§§ 186.22, subd. (b)(1), 12022.5, subd. (a)). The court sentenced Heard to a total prison term of 23 years plus 80 years to life.

Heard appeals, contending his attempted murder convictions (counts 1 & 2) must be reversed because the court prejudicially erred in refusing to admit into evidence out-

of-court statements made by Mills during two pretrial interviews.² We conclude the court did not abuse its discretion in excluding evidence of the alleged statements. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND³

A. *The People's Case*

1. *January 3, 2005 shooting (counts 1 & 2)*

Heard, codefendant Mills, Ricky Pangelinan, Michael White, Roosevelt White, and Bobby Jones are members of the West Coast Crips gang.

² In his opening brief, Heard also contended that his section 12022.53, subdivision (c) enhancements should have been either stricken or not imposed at all, rather than stayed, and his section 12022.5 enhancements also should have been stricken or not imposed at all, rather than stayed. Thereafter, on June 24, 2008, Heard's counsel filed a request to strike these contentions, indicating they were no longer viable as a matter of law in light of the California Supreme Court's recent decision in *People v. Gonzalez* (2008) 43 Cal.4th 1118. As Heard has withdrawn these additional contentions, we do not further address them.

³ Because Heard does not challenge the sufficiency of the evidence, and the facts are only marginally relevant to the evidentiary issue he raises on appeal, our summary of the facts, which are undisputed, is abbreviated. We note that the statements of facts provided in both the appellant's opening brief and the respondent's brief do not comply with California Rules of Court, rule 8.204(a)(1)(C), which provides: "Each brief must . . . [¶] . . . [s]upport any reference to a matter in the record by a citation to the volume and page number in the record where the matter appears." For example, the respondent's statement of facts contains paragraphs that recite numerous facts and end with a long string of citations to the reporter's transcript, making it very burdensome for this court to determine which fact is supported by which citation. Other citations in the respondent's statement of facts cite 20 pages or more in the reporter's transcript in support of relatively simple factual propositions. Heard's opening brief, like the respondent's brief, contains long strings of citations to the record following the presentation of multiple facts. Such noncompliance with California Rules of Court, rule 8.204(a)(1)(C) is unacceptable, and counsels' briefs will be stricken in accordance with the provisions of California Rules of Court, rule 8.204(e)(2)(B) should it occur again.

The 5/9 Brim Association and Lincoln Park gangs are Blood gangs that are rivals of the West Coast Crips gang. The West Coast Crips gang territory includes the Logan Heights area. Michael and Roosevelt White lived in an apartment complex on K Street in this area that was a frequent gang hangout.

On January 3, 2005,⁴ Jessica Godinez borrowed a white Mitsubishi Galant and drove to Michael White's apartment at around 7:00 p.m. After she arrived, she gave him a ride to cash a check. Godinez told the police that Heard came along, and on their way back they picked up Mills on L Street. Godinez said that later that evening, Heard, Mills, and possibly Michael White borrowed the Mitsubishi from Godinez and were gone for about 30 to 60 minutes.

At about 8:15 p.m. that same evening, San Diego Police Detective Steven Hobbs and Officer Richard McCoy were conducting a traffic stop in West Coast Crips territory. They observed a four-door Mitsubishi Galant containing four African-American males wearing dark-colored clothing commonly worn by West Coast Crips members. As the Mitsubishi approached Detective Hobbs and Officer McCoy, the occupants first looked towards them, and then quickly looked away with a "deer in the headlights" expression. Detective Hobbs recognized Mills in the front passenger seat based upon a traffic stop involving some West Coast Crips in the same car a month earlier.

Shakyla Bell testified that on the evening of January 3, she and some friends were walking to a market on 47th Street when a white four-door vehicle drove by them and

⁴ All further dates are to calendar year 2005 unless otherwise specified.

someone inside the vehicle said, "What's crackin', cuz?" Bell recognized this as a gang statement commonly used by Crips, but not by the Bloods from her neighborhood. Bell's group ignored the comment, walked into the store, and then walked back to where they were hanging out at a house on "T" Street. The group included Bell, Simon Judge, Terrance Hillman, James Compare, and others.

The white Mitsubishi drove past the "T" Street house. The front passenger, a Black male with a bald head, made eye contact with Compare and then quickly leaned back in the seat. The Mitsubishi sped off, and then quickly turned around and passed by a second time. This time, the front passenger, who was wearing a dark-colored hooded sweatshirt and had braids in his hair fired 6 to 10 gunshots toward the group. Hillman was struck once in the leg, and Judge was struck in the head and hip.

Later that evening, Pangelinan was walking to his girlfriend's house when he ran into a group of his friends, including Heard, Mills, Jones, and Michael and Roosevelt White. While they were walking, Heard told Pangelinan, "I got me one," "I got a slob nigga," which Pangelinan understood to mean that Heard shot a Blood gang member. "Slob" is a derogatory term for a Blood. The group then continued walking to the store and back to the White residence.

At the White residence, Michael White retrieved a box of ammunition from underneath his bed and placed it between Heard and Mills. Heard and Mills then removed guns from their persons and reloaded them. Mills had a chrome .22-caliber gun with a pearl handle. Heard had a larger, black revolver. After they reloaded the guns, Heard and Mills traded guns and each placed his gun between his waist and pants.

Meanwhile, Detective Hobbs had responded to the scene of the shooting on "T" Street and observed .22-caliber shell casings in the front yard of the house. Witness descriptions of the vehicle involved in the shooting matched the description of the Mitsubishi that Detective Hobbs observed earlier that evening. The police located the Mitsubishi parked on the street in front of the White residence, which was a known West Coast Crips hangout, and the police maintained surveillance of the vehicle.

Later that night, Mills, Pangelinan and Godinez walked outside the White residence in order to drive to a drug house. They walked to the Mitsubishi, checked the interior for gun shells, and drove away. Detective Hobbs quickly pulled the Mitsubishi over. While illuminating the car with his spotlights, Detective Hobbs observed Mills nervously looking over his shoulder, appearing to be yelling at Godinez, who was driving.

Mills ordered Godinez to flee from the police. As Detective Hobbs walked towards the Mitsubishi, it suddenly sped off and Detective Hobbs and other officers gave chase. At one point during the chase, Mills removed a gun from his pants and threw it out of the window. The chase continued down Highway 94, and eventually came to an end after Mills told Godinez to pull over.

Later that night, a .22-caliber semiautomatic handgun was found in the area where Mills threw the gun out of the window. Three of the bullets in the gun were stamped with "REM" which matched the shell casings found at the scene of the shooting. It was subsequently determined that the .22-caliber shell casings found at the scene of the

shooting were fired from the recovered gun. Gunshot residue was found on Mills's right hand.

Detective Carter later interviewed Bell, showed her a six-pack photographic lineup containing Heard's picture, and asked about the person who said, "What's crackin' cuz?," Bell said Heard's picture "looked like him from afar."

On January 24 the police brought Heard in for questioning. Heard initially denied he had been in possession of a gun earlier that evening, but later said he had possessed a gun and discarded it in some bushes. The police drove Heard to the area but were unable to locate the gun. When the police again asked Heard about the location of the gun, he told them he hid it in the first police car into which he had been placed that evening. After searching that car, the police located a .25-caliber chrome pistol with a pearl handle wedged in the back seats. The .25-caliber shell casings found at the scene of the "T" Street shooting were later determined to have been fired from that gun. Heard's fingerprint was found on this gun.

A videotape of a 2005 New Year's party was found inside the Mitsubishi. The tape was made on either December 31, 2004, or January 1, 2005. At one point, Heard was shown holding a .25-caliber gun that appeared to be the same gun recovered from the police car on January 24. At another point, Heard is shown rapping about the Crips gang and glorifying a prior killing of some "slob nigga" Bloods.

The police interviewed Pangelinan several times after his arrest. Pangelinan told the police he was at the White residence on the night of the shooting and saw Heard,

Mills, the Whites, and Godinez in the bedroom, where Heard told him, "We busted on some slob niggas."

B. The Defense

Heard testified he was a member of the West Coast Crips, and the language used in the New Year's Eve party video was common to rap music. Heard possessed a .22-caliber handgun that evening, and it was shown in the video. When he was not in possession of the handgun, he stored it in a "stash" spot where it was accessible to other members of his gang. The gun that he possessed and the police found on January 24, was a different, .25-caliber gun.

Heard testified he was not involved in the January 3 shooting. He was not in the white Mitsubishi that evening, and he did not shoot anyone. On that date, he was not in possession of the gun the police found on January 24. He first came into possession of that gun a few days before January 24.

DISCUSSION

Heard contends his attempted murder convictions (counts 1 & 2) must be reversed because the court prejudicially erred in refusing to admit into evidence out-of-court statements made by Mills during two pretrial interviews. We reject this contention.

A. Background

During the course of two pretrial interviews regarding the January 3 "T" Street shootings, Mills, who did not testify during the trial, made statements (1) to San Diego Police Detectives Hastings and Murphy in the early morning hours of January 4

following his arrest, and (2) to defense investigator Ernesto Zetino on November 22, 2006.

According to Detective Murphy's report, Mills indicated during the first interview that he was in the back seat of the white Mitsubishi at the time of the shooting and he stated three people were in the car, "J" (Godinez) was driving, and an unknown dark-skinned male in the front passenger seat committed the shootings. The report also indicated that Mills refused to tell the detectives who was in the car with him and stated that Mills "refused to identify [Heard] or to tell [them Heard] was in the car."

According to defense investigator Zetino's report, during the second interview Mills stated that Heard was not with him the night Mills was arrested on January 3 and the last time he saw Heard was around Christmas.

Heard moved to admit evidence of Mills's statements, claiming they were admissible under the hearsay exception codified in Evidence Code section 1220 on the ground they were admissions by a party.

The court denied Heard's motion. The court found that the statements "do not rise to the dignity of an admission," and there were "no realistic indicia of trustworthiness."

B. *Evidence Code Section 1220*

Evidence Code section 1220 governs the admissibility of a statement of a party.⁵ (See *People v. Castille* (2005) 129 Cal.App.4th 863, 876, fn. 3 (*Castille*).) That section

⁵ "The exception to the hearsay rule for statements of a party is sometimes referred to as the exception for admissions of a party. However, Evidence Code section 1220 covers all statements of a party, whether or not they might otherwise be characterized as

provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered *against* the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity." (Italics added.)

"The statement of a party is the most straightforward of the hearsay exceptions." (*Castille, supra*, 129 Cal.App.4th at p. 875.) "Simply stated, and as a general rule, if a party to a proceeding has made an out-of-court statement that is relevant and not excludable under Evidence Code section 352, the statement is admissible *against* that party declarant." (*Castille, supra*, at pp. 875-876, italics added.)

Citing Evidence Code section 1220, the California Supreme has explained that "[t]he hearsay rule does not bar statements when offered *against* the declarant in an action in which the declarant is a party." (*People v. Horning, supra*, 34 Cal.4th at p. 898, italics added.) Thus, in a criminal case, if the evidence is of statements, the defendant was the declarant, the statements are offered *against* him, and he is a party to the action, the hearsay rule does not make the statements inadmissible. (*People v. Carpenter, supra*, 21 Cal.4th at p. 1049.)

C. Analysis

Heard asserts the court committed state law error by refusing to allow him to present Mills's interview statements in order to both exculpate himself and inculpate

admissions. [Citations.]" (*People v. Horning* (2004) 34 Cal.4th 871, 898, fn. 5, italics omitted.) "It is true that the section heading refers to 'Admission of party,' but the heading is irrelevant to its construction." (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1049, citing Evid. Code, § 5.)

Mills. He also asserts the court's refusal to admit Mills's statements was a federal constitutional violation as it amounted to a denial of his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution to present witnesses on his behalf and to present a complete defense to the charges against him. These assertions are unavailing.

The court did not err in excluding the hearsay evidence of Mills's extrajudicial statements because Heard did not offer that evidence *against* Mills, the declarant, as Evidence Code section 1220 and relevant case authorities require. As already discussed, evidence of the statement of a party, in order to be admissible under the hearsay exception set forth in Evidence Code section 1220, must be offered *against* the declarant party. (Evid. Code, § 1220; *People v. Horning*, *supra*, 34 Cal.4th at p. 898; *People v. Carpenter*, *supra*, 21 Cal.4th at p. 1049; *Castille*, *supra*, 129 Cal.App.4th at p. 876.)

Here, the primary thrust of Heard's argument to the court, which he made in his motion in limine for leave to present evidence of Mills's statements, was that the statements "provide[d] *exculpatory* evidence that [could] be used in [Heard's] defense" (italics added) and that the statements "should be placed before the trier of fact for evaluation in order to uphold [his] Fourteenth Amendment right to Due Process." Heard also argued that if the court excluded the evidence of Mills's statements, he "would be denied fundamental Due Process rights by discarding reliable, *exculpatory* evidence with a high probative value relating to [his] defense that he was not present in the shooting vehicle." (Italics added.) As already noted, Heard continues to rely on these arguments on appeal.

Because the evidence of Mills's extrajudicial statements was hearsay, as Heard has acknowledged, and Heard's manifest primary interest in presenting that evidence to the jury was to exculpate himself rather than inculpate Mills, the declarant party, we conclude the hearsay exception for a statement of a party set forth in Evidence Code section 1220 did not apply, and thus the court properly excluded that evidence.

Heard's contention that the court's exclusion of the proffered evidence of Mills's statements deprived him of his constitutional right to present a complete defense is unavailing. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [citation], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [citations], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) However, "[a] defendant's right to present relevant evidence is not unlimited [Citations.] A defendant's interest in presenting such evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" (*U.S. v. Scheffer* (1998) 523 U.S. 303, 308, fn. omitted.) One such interest is adherence to standard rules of evidence. (*Taylor v. Illinois* (1988) 484 U.S. 400, 410; *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1756.) The rule governing the admissibility of a statement of a party, as codified in Evidence Code section 1220, is one such standard rule of evidence.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.